93-665

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN JABE, Warden,
and
FRANK J. KELLEY, Attorney General,
Petitioners,

v

DAVID A. BUNKER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

SHOULD CERTIORARI BE GRANTED WHERE THE DECISION OF THE COURT OF APPEALS, GRANTING HABEAS CORPUS RELIEF BASED ON *SANDSTROM* v *MONTANA* FROM A 26-YEAR-OLD MURDER CONVICTION, CONFLICTS WITH THE RETROACTIVITY ANALYSIS OF *TEAGUE* v *LANE* AND THE HARMLESS ERROR ANALYSIS IN *BRECHT* v *ABRAHAMSON?*

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JOHN JABE, Warden,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit dated April 1, 1993 granting the writ of habeas corpus (subsequently withdrawn) is reprinted in the appendix hereto, p. A-1, *infra*.

The order of the Court of Appeals for the Sixth Circuit dated April 2, 1993 withdrawing the Court's opinion of April 1, 1993 is reprinted in the appendix hereto, p. A-4, *infra*.

The opinion of the Court of Appeals for the Sixth Circuit dated June 10, 1993 granting the writ of habeas corpus is reprinted in the appendix hereto, p. A-5, *infra*.

The opinion of the Court of Appeals for the Sixth Circuit dated August 23, 1993 denying the petition for rehearing en banc is reprinted in the appendix hereto, p. A-8, *infra*.

JURISDICTION

This petition arises from a habeas corpus action filed in the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. 2254 seeking relief from a State of Michigan conviction for first-degree murder. On March 19, 1992 the Eastern District denied the petition.

On respondent's appeal, the Court of Appeals for the Sixth Circuit reversed and granted the petition on April 1, 1993. On April 2, 1993 the opinion was withdrawn. On June 10, 1993 the Court of Appeals again reversed and granted the petition.

On August 23, 1993 the Court of Appeals for the Sixth Circuit denied the petition for rehearing en banc.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State ~~where~~in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This appeal arises from a habeas corpus action filed in the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. 2254. In 1967 respondent, David Bunker, and a codefendant, Robert Casper, were convicted of first-degree felony murder following a joint trial in a Michigan court. Both defendants received the mandatory sentence of life in prison.

The convictions arose from the shooting of a gas station attendant during an attempted armed robbery. Respondent, who testified at trial, admitted that he stole an automobile on the afternoon of the day of the murder and drove home, where he armed himself with a gun which he knew to be loaded. That evening, respondent drove with his codefendant to a gas station despite the fact that the car's gas tank was already more than 3/4 full. After the shooting, respondent drove away from the scene at speeds up to 110 miles per hour while the police gave chase. Respondent claimed that he unloaded the gun and threw it out the window. Respondent admitted that he shot the attendant but claimed the shooting occurred accidentally when he and the unarmed attendant got into an argument and respondent tried to defend himself. The gas station manager testified he did not see or hear any indication of an argument between respondent and the decedent, although he was in close proximity to them. Codefendant Casper, who did not testify, asserted a defense of mere presence as a passenger in the car. Casper was convicted as an aider and abetter.

Respondent and Casper appealed their convictions separately in the Michigan courts and were denied relief. Then Casper succeeded in having his conviction overturned by the federal courts. In 1984, he filed a petition for writ of habeas corpus claiming that the jury

instructions on intent violated the rule of *Sandstrom* v *Montana*, 442 U.S. 510 (1979), which was decided 12 years after respondent's and Casper's trial. In 1986, the United States District Court for the Western District of Michigan granted the writ of habeas corpus and, in 1987, the United States Court of Appeals for the Sixth Circuit affirmed in an unpublished *per curiam* opinion. *Casper* v *Grant*, 817 F.2d 756 (6th Cir. 1987), *cert den*, 485 U.S. 940 (1988). In *Casper* the Court of Appeals applied *Sandstrom* retroactively and held that the jury instruction violated *Sandstrom* and was not harmless as to defendant Casper.

In 1988, following this Court's denial of certiorari, Casper entered a plea of guilty in state court to second-degree murder and received a sentence of 20-40 years with credit for time served. Shortly thereafter he was discharged from prison upon the expiration of his sentence.

In June 1988, respondent initiated a postconviction proceeding in the trial court raising the same *Sandstrom* claim and relying on the holding in *Casper*. The trial court found that the error was harmless and denied relief. The Michigan appellate courts denied leave to appeal. In February 1989, while respondent's appeal was pending in the Michigan courts, this Court issued its decision in *Teague* v *Lane*, 489 U.S. 288, *reh den*, 490 U.S. 1031 (1989), which limited retroactivity of decisions in habeas corpus cases. Subsequently, in April 1990, respondent filed this habeas corpus action based on the claim that the jury instructions on intent violated *Sandstrom*.

In February 1991 the Magistrate Judge issued a Report and Recommendation finding that *Sandstrom* should be applied retroactively to respondent's conviction and recommending that the writ be granted. On October 24,

1991, the Sixth Circuit Court of Appeals decided *Cain* v *Redman*, 947 F.2d 817 (6th Cir. 1991), *cert den*, ___ U.S. ___, 112 S.Ct. 1299, 117 L.Ed.2d 521 (1992), holding that *Sandstrom* should not be given retroactive application under *Teague*. In March 1992, the District Judge issued an Opinion and Order rejecting the Report and Recommendation and denying the writ. *Bunker* v *Jabe*, 787 F. Supp. 718 (ED Mich. 1992). Relying on the *Cain* decision, the District Court Judge held that *Sandstrom* may not be applied retroactively to respondent's conviction under *Teague*. The respondent then appealed to the United States Court of Appeals for the Sixth Circuit.

Only two weeks after oral argument was held on March 16, 1993, the panel of the Court of Appeals issued its initial opinion on April 1, 1993 (A-1), holding that the writ of habeas corpus should be granted. While the panel acknowledged that the briefs and oral argument presented "sophisticated discussions of the case law concerning retroactive application of the rule of *Sandstrom*," the panel dismissed retroactivity analysis altogether, stating "that discussion has little bearing upon the resolution of this appeal, since its outcome is governed by the doctrine of law of the case." *Bunker* v *Jabe*, No. 92-1406, 4-1-93 Slip. Op. (A-2). Without any citation to supporting case law or discussion of the evidence at trial, the panel concluded that respondent Bunker should be granted the writ because codefendant Casper had previously received such relief and that the error as to Bunker was not harmless.

Recognizing the improvidence of its hasty decision, the panel issued an order the next day, April 2, 1993, vacating its opinion (A-4).

On June 10, 1993, the panel issued its final opinion which again held that the writ should issue. Again making reference to the law of the case doctrine and to

general principles of fairness, the panel held that "[n]otwithstanding general applicability of our ruling in *Cain*," the Court would make an exception in this case because *Cain*'s "new rule of retroactivity threatens to subject two codefendants in a case arising from the same facts to different legal standards." *Bunker* v *Jabe*, No. 92-1406, 6-10-93 Slip Op. (A-6). Once again the panel found the *Sandstrom* error was not harmless as to the respondent without any discussion of the evidence. The panel also failed to acknowledge this Court's recent revision of harmless error analysis in *Brecht* v *Abrahamson*, 507 U.S. ___ (1993).

On June 21, 1993 the petitioner filed a petition for rehearing en banc. This petition was denied on August 23, 1993 (A-8), and the Court of Appeals issued a mandate on September 1, 1993.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED WHERE THE DECISION OF THE COURT OF APPEALS, GRANTING HABEAS CORPUS RELIEF BASED ON *SANDSTROM* v *MONTANA* FROM A 26-YEAR-OLD MURDER CONVICTION, CONFLICTS WITH THE RETROACTIVITY ANALYSIS OF *TEAGUE* v *LANE* AND THE HARMLESS ERROR ANALYSIS IN *BRECHT* v *ABRAHAMSON*.

In *Sandstrom* v *Montana*, 442 U.S. 510 (1979), this Court held that certain presumptive intent instructions are constitutionally invalid. Prior to this Court's landmark decision on retroactivity analysis in habeas corpus cases in *Teague* v *Lane*, 489 U.S. 288, *reh den*, 490 U.S. 1031 (1989), the Sixth Circuit Court of Appeals had applied *Sandstrom* retroactively. See, *e.g.*, *Merlo* v *Bolden*, 801 F.2d 252 (6th Cir. 1986). However, *Teague* revised retroactivity analysis in habeas corpus cases. *Teague* held that a new rule of criminal procedure may not be

announced or applied retroactively on collateral review cases unless the rule falls within either of two narrow exceptions:

1) it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or

2) it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'"

Teague, 489 U.S. at 311.

In *Cain* v *Redman*, 947 F.2d 817 (6th Cir. 1991), *cert den*, ___ U.S. ___, 112 S. Ct. 1299, 117 L.Ed.2d 521 (1992), the Sixth Circuit Court of Appeals, in a published opinion, carefully applied *Teague* analysis to a *Sandstrom* claim and held that, henceforth, *Sandstrom* may not be applied retroactively. The Court found that *Sandstrom* is a new rule, see, *Butler* v *McKellar*, 494 U.S. 407, *reh den*, 495 U.S. 915 (1990); *Penry* v *Lynaugh*, 492 U.S. 302 (1989), and that *Sandstrom* does not fall within either of the *Teague* exceptions.

In the instant case, the panel of the Sixth Circuit Court of Appeals did not argue that *Cain* was wrongly decided or that *Sandstrom* should be applied retroactively, post-*Teague*, as a general rule. Indeed, the panel has carved out a "special circumstances" exception to the general rule of non-retroactivity enunciated in *Teague*. Thus the panel has created a new rule within the context of a habeas corpus case — an action which is expressly prohibited by *Teague* unless the court can demonstrate that its new rule falls within one of the two *Teague* exceptions created by the Supreme Court. In the alternative, the panel's decision can be seen as rewriting *Teague* to carve out a third exception to *Teague*'s general rule of non-retroactivity.

The Sixth Circuit's action is directly contrary to the policies of comity and federalism underlying *Teague* and its progeny. In those cases this Court has repeatedly emphasized that federal habeas corpus should not be used to undermine the finality of state criminal convictions which were valid under then-existing constitutional principles at the time they became final. *Saffle* v *Parks*, 494 U.S. 484, 488, *reh den*, 495 U.S. 924 (1990); *Sawyer* v *Smith*, 497 U.S. 227, 234, *reh den*, 497 U.S. 1051 (1990); *Butler* v *McKellar*, *supra*, 494 U.S. at 414. The Sixth Circuit recognized in *Cain* that the type of jury instructions which were overturned in *Sandstrom* were widely used and were considered legally valid prior to the *Sandstrom* decision. *Cain*, *supra*, 947 F.2d at 821. It is noted that *Sandstrom* was decided 12 years after respondent's trial and 9 years after his direct appeal became final.

Moreover, *Teague*'s analysis of whether a rule should be applied retroactively is not to be done on a case-by-case basis. Under *Teague*, whether a rule of criminal procedure may be applied retroactively depends on legal analysis of the rule itself, not on analysis of the facts of each case to which the rule may be applied. A court performing the *Teague* analysis is merely required to determine whether the rule is a new rule, and if so, whether it falls within either of the two exceptions. This Court's policy in *Teague* of insuring certainty and finality of state criminal convictions mandates against permitting the federal courts to make exceptions based on particular factual circumstances to rules held to be non-retroactive.

Moreover, even if the Sixth Circuit correctly applied *Sandstrom* retroactively in the instant case, it is unclear whether the panel applied the proper standard of harmless error analysis. In its opinion finding that the error

was not harmless the Court of Appeals cited no case authority indicating the standard of harmless error analysis used. In *Chapman* v *California*, 389 U.S. 18 (1967), this Court held that an error of constitutional dimension does not require reversal of a criminal conviction if the reviewing court may say, based on the whole record, that the error was harmless beyond a reasonable doubt. In *Rose* v *Clark*, 478 U.S. 570 (1986), this Court held that the *Chapman* harmless error standard may be applied to a *Sandstrom* violation. Presumably, the *Chapman* harmless error standard was used by the panel in this case and by the Court in *Casper* on whose finding of harmless error the instant panel relied.

However, in *Brecht* v *Abrahamson*, *supra*, decided April 21, 1993, this Court announced a new, less-stringent standard of harmless error analysis to be applied henceforth on habeas corpus review of trial errors. Instead of determining whether the error was harmless beyond a reasonable doubt:

> "... the standard for determining whether habeas relief must be granted is whether the ... error 'had substantial and injurious effect or influence in determining the jury's verdict.' *Kotteakos* v *United States*, 328 U.S. 750, 776, 90 L Ed 2d 1557, 66 S Ct 1239 (1946). The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous consideration underlying our habeas jurisprudence."
>
> *Brecht*, 123 L.Ed.2d at 363.

This Court went on to explain that the considerations underlying habeas jurisdiction include the state's

interest in finality and its sovereignty over criminal matters. *Brecht*, 123 L.Ed.2d at 372. "Moreover," the Court added, "granting habeas relief merely because there is a 'reasonable possibility' that trial error contributed to the verdict, see *Chapman* v *California*, 386 U.S. at 24 . . . is at odds with the historic meaning of habeas corpus — to afford relief to those whom society has 'grievously wronged.'" *Brecht*, 123 L.Ed.2d at 372 (citations omitted).

In the instant case, the evidence overwhelmingly supports the finding that the killing of Alan Pringle was intentional. Respondent stole a car on the afternoon of the murder and drove home, where he armed himself with a gun which he knew to be loaded. Respondent then drove with his codefendant to a gas station, despite the fact that the car's gas tank was already three-quarters full. The manager of the station did not see or hear any indication of an argument between the respondent and the victim, although he was in close proximity to them. The respondent admitted sticking the gun out of the car window at a person he thought had beat him up several months earlier. Following the shooting the respondent fled the scene at speeds of up to 110 miles per hour and avoided a police roadblock.

Given the overwhelming evidence of respondent's guilt, clearly the Court of Appeals could not say that he was "grievously wronged" by being convicted of felony murder. Thus, even if *Sandstrom* were to be applied retroactively to the instant case, the error was harmless under the newly-announced standard in *Brecht*.

Finally, we submit that the Sixth Circuit erred in its reliance upon *Walter* v *United States*, 969 F.2d 814 (9th Cir. 1992) for the proposition that "like cases be treated alike is 'particularly strong . . . when the two cases are not merely factually alike or even factually identical, but

arise from the same facts.'" The cases against the respondent and his codefendant, while arising from common facts, are not identical. The codefendant was the passenger in the car. His guilt arose under a theory of aiding and abetting. The respondent, on the other hand, was the actual perpetrator of the crime. He drove the car and he pulled the trigger. His guilt does not have to be imputed or inferred. The evidence of his intent is clearly shown by the facts of the case. We submit that the two parties do not have to be treated alike because the evidence against them was not identical. While the codefendant's guilt was built upon inference, the respondent's was built on direct evidence. For this reason the petitioner would submit that the Court of Appeals erred in holding that codefendants must be treated alike.

RELIEF REQUESTED

Petitioner respectfully requests that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

By: /s/ CARL J. MARLINGA
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Dated: October 19, 1993

APPENDIX TO PETITION FOR CERTIORARI

• • •

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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(United States Court of Appeals — Sixth Circuit)

(Filed April 1, 1993)

(DAVID A. BUNKER, Petitioner-Appellant, v. JOHN JABE, Warden; and FRANK J. KELLEY, Attorney General, Respondents-Appellees — No. 92-1406; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: **MARTIN** and **NORRIS**, Circuit Judges; **COFFIN**, Senior Circuit Judge.*

PER CURIAM.

Petitioner, David A. Bunker, in this action seeking a writ of habeas corpus, challenges the constitutionality of his 1967 state conviction for murder. In examining the conviction of petitioner's codefendant Robert E. Casper, upon his petition for a writ of habeas corpus, this court in 1987 held that instructions given to the jury in the joint trial of petitioner and Casper unconstitutionally shifted the burden of proof regarding intent to commit murder, in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). *Casper* v. *Grant*, No. 86-1639, 817 F.2d 756 (6th Cir. May 7, 1987) (text in Westlaw), *cert. denied*, 485 U.S.

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* **The Honorable Frank M. Coffin, Senior Circuit Judge, United States Court of Appeals for the First Circuit, sitting by designation.**

940 (1988). The court granted the writ. *Id.* In 1989, a plurality of the members of the United States Supreme Court, in *Teague* v. *Lane*, 489 U.S. 288 (1989), dramatically revised the manner in which courts are to determine whether a new rule of constitutional law should be applied retroactively to convictions that became final prior to the articulation of the new rule.[1] According to *Teague*, habeas corpus petitioners no longer may claim the benefit of rules announced after their direct appeals are exhausted, unless retroactive application is warranted under narrow exceptions set out in the opinion. Although this court had consistently applied the rule of *Sandstrom* retroactively to habeas petitioners prior to the decision in *Teague*, this court in 1991 relied upon the *Teague* analysis to conclude that *Sandstrom* no longer would enjoy retroactive application. *Cain* v. *Redman*, 947 F.2d 817 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1299 (1992).

Reviewing this case law, the district court expressed dismay at the prospect of treating Casper and Bunker differently, but concluded that it was required to do so by our opinion in *Cain*. We have before us the district court's order denying Bunker's petition.

Although we have been favored on appeal with sophisticated discussions of the case law concerning retroactive application of the rule of *Sandstrom*, that discussion has little bearing upon the resolution of this appeal, since its outcome is governed by the doctrine of law of the case.

Bunker and his codefendant, Casper, were convicted at the conclusion of the same trial, by the same jury. In *Casper*, we held that the jury instruction given in the

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[1] **A majority of the Court embraced the *Teague* framework in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989).**

joint trial was constitutionally infirm and that Casper was therefore entitled to a writ of habeas corpus. Since we previously held that the instruction in that case was infirm, that holding remains the law of the case, and it follows that Bunker's constitutional rights also were abridged.

Accordingly, because we conclude that the error committed by the trial court was not harmless, we **reverse** the judgment of the district court, and **remand** this cause to that court with instructions to **issue** a writ of habeas corpus directing the State of Michigan to discharge petitioner from custody unless it elects to afford him a new trial within ninety days of the issuance of the writ.

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed April 2, 1993)

(DAVID A. BUNKER, Petitioner-Appellant, v. JOHN JABE, Warden; and FRANK J. KELLEY, Attorney General, Respondents-Appellees — No. 92-1406)

It appearing that the per curiam opinion filed in this appeal on April 1, 1993 was filed in error; it is

ORDERED that that opinion be, and hereby is, vacated, and the case restored to the pending docket of the court for subsequent decision.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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(United States Court of Appeals — Sixth Circuit)

(Filed June 10, 1993)

(DAVID A. BUNKER, Petitioner-Appellant, v. JOHN JABE, Warden; and FRANK J. KELLEY, Attorney General, Respondents-Appellees — No. 92-1406; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: MARTIN and **NORRIS**, Circuit Judges; **COFFIN**, Senior Circuit Judge.*

PER CURIAM.

Petitioner, David A. Bunker, in this action seeking a writ of habeas corpus, challenges the constitutionality of his 1967 state conviction for murder. In examining the conviction of petitioner's codefendant, Robert E. Casper, upon his petition for a writ of habeas corpus, this court in 1987 held that instructions given to the jury in the joint trial of petitioner and Casper unconstitutionally shifted the burden of proof regarding intent to commit murder, in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). *Casper* v. *Grant*, No. 86-1639, 817 F.2d 756 (6th Cir. May 7, 1987) (text in Westlaw), *cert. denied*, 485 U.S. 940 (1988). The court granted the writ. *Id.* In 1989, a plurality of the members of the United States Supreme Court in *Teague* v. *Lane*, 489 U.S. 288 (1989), dramatically

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*** The Honorable Frank M. Coffin, Senior Circuit Judge, United States Court of Appeals for the First Circuit, sitting by designation.**

revised the manner in which courts are to determine whether a new rule of constitutional law should be applied retroactively to convictions that became final prior to the articulation of the new rule.[1] According to *Teague*, habeas corpus petitioners no longer may claim the benefit of rules announced after their direct appeals are exhausted, unless retroactive application is warranted under narrow exceptions set out in the opinion. Although this court had consistently applied the rule of *Sandstrom* retroactively to habeas petitioners prior to the decision in *Teague*, this court in 1991 relied upon the *Teague* analysis to conclude that *Sandstrom* no longer would enjoy retroactive application. *Cain* v. *Redman*, 947 F.2d 817 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1299 (1992).

Reviewing this case law, the district court expressed dismay at the prospect of treating Casper and Bunker differently, but concluded that it was required to do so by our opinion in *Cain*. We have before us the district court's order denying Bunker's petition.

Notwithstanding the general applicability of our ruling in *Cain*, this appeal presents us with the idiosyncratic situation in which the timing of a case announcing a new rule of retroactivity threatens to subject two codefendants in a case arising from the same facts to different legal standards.

Bunker and his codefendant, Casper, were convicted at the conclusion of the same trial, by the same jury. In *Casper*, we held that the jury instruction given in the joint trial was constitutionally infirm and that Casper was therefore entitled to a writ of habeas corpus. Now, under *Teague* and *Cain*, we are being asked to declare

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[1] **A majority of the Court embraced the *Teague* framework in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989).**

that the same instruction is no longer infirm as to petitioner.

As the Ninth Circuit said in a case where a codefendant had been subjected to an erroneous speedy trial ruling while his codefendants had received a favorable ruling on the same point, the principle that like cases be treated alike is "particularly strong . . . when the two cases are not merely factually alike or even factually identical, but arise from *the same facts*." *Walter* v. *United States*, 969 F.2d 814, 817 (9th Cir. 1992). *See also United States* v. *Anderson*, 584 F.2d 849, 853 (6th Cir. 1978) ("manifest injustice" to allow conviction of one codefendant to stand while ordering new trial for other codefendant based upon error in admitting evidence).

This principle, that like cases be treated alike, seems to us to fall within the spirit, if not the letter, of the law of the case doctrine, one example of which is the influence of a prior ruling "of the same court . . . acting within the framework of a single case or closely related cases." 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4478 (1981).

We therefore feel constrained on this record to hold that the jury instruction in petitioner's case be viewed as it was in codefendant Casper's case.

Accordingly, because we conclude that the error committed by the trial court was not harmless, we **reverse** the judgment of the district court, and **remand** this cause to that court with instructions to **issue a writ** of habeas corpus directing the state of Michigan to discharge petitioner from custody unless it elects to afford him a new trial within ninety days of the issuance of the writ.

ISSUED AS MANDATE: *9-01-93*
COSTS: *NONE*

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed August 23, 1993)

(DAVID A. BUNKER, Petitioner-Appellant, v. JOHN JABE, WARDEN, ET AL., Respondents-Appellees — No. 92-1406)

BEFORE: MARTIN and NORRIS, Circuit Judges;
COFFIN, Senior United States Circuit Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

*** The Honorable Frank M. Coffin, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, sitting by designation.**